United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7022

To be argued by
IRA A. FINKELSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

LUCIO P. SALVUCCI,

Plaintiff-Appellant,

—against—

THE NEW YORK RACING ASSOCIATION, INC., et al.,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE THE NEW YORK RACING ASSOCIATION, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUCIO P. SALVUCCI,

Plaintiff-Appellant,

-against-

THE NEW YORK RACING ASSOCIATION, INC., et al.,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE
THE NEW YORK RACING ASSOCIATION INC.

This is an appeal by plaintiff-appellant Lucio P. Salvucci, pro se,* from a Memorandum and Order entered in the United States District Court for the Eastern District of New York on December 3, 1975 by the Honorable Jacob Mishler, Chief Judge, granting the motions of several of the defendants to dismiss the complaint for failure to state a claim upon which relief can be granted and, alternatively, for summary judgment.

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* Mr. Salvucci was at all times represented by counsel in this action up to the filing of this appeal.

On March 1, 1976 the United States Court of Appeals for the First Circuit affirmed, per curiam, the dismissal of two actions identical to this one which were brought by appellant and his wife in the District of New Hampshire against racetracks there. The nature of all these appeals was appropriately described by the First Circuit:

> "[p]laintiffs find themselves unable to accept the fundamental difference between copyright and patent protection, although their case is a classic example or illustration of it . . . . The issues and the answers are so clear that no purpose would be served in hearing oral argument." Salvucci v. New Hampshire Jockey Club, Inc., No. 75-1434 (1st Cir. Mar. 1, 1976) (A copy of the court's opinion is annexed as Exhibit A to this Brief.)

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does a complaint alleging infringement of an idea for a type of wager, as opposed to a particular description of that idea, state a claim upon which relief can be granted under the Copyright Act?

2. Is summary judgment appropriate where there clearly is no factual issue of appropriation of any method of expression for which copyright protection may be claimed?

The Complaint

This is an action purportedly brought under the Copyright Act, 17 U.S.C. §§ 1 et seq. (1970), as amended, with jurisdiction predicated upon 28 U.S.C. § 1338(a)(1970). Simply stated, appellant's contention is that he holds a copyright to the "idea" of a simple parimutuel wager in which the winning bettor must select, in sequential order, the first three finishing horses in a single race or in each of two races and that defendants-appellees The New York Racing Association Inc. ("NYRA") and Roosevelt Raceway, Inc. and defendant New York City Off-Track Betting Corporation "infringed" upon the idea by actually conducting a similar form of wager known as the Triple (or the Trifecta). As Chief Judge Mishler observed, it has long been settled law that appellant's "idea", as distinguished from the words used to describe such an idea, is not entitled to copyright protection under the Copyright Act and that the complaint consequently fails to state a claim upon which relief can be granted. Appellant's alleged copyrights are attached to his complaint (Appellant's Appendix pp. 12 and 15)* each of which consists of a single sheet of paper, one

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* Reference to the Appendix shall hereinafter be cited as (__a).

entitled "Tri-3" and the other "Tri-3 Double." These are works of extreme brevity. For example, the entire text of the former consists of but three sentences:

> "TRI-3
>
> "TRI-3 is a 3 finish position play or wager on horses or dogs. The object is to select correctly all finish positions starting with your first chosen finish position of your TRI-3 ticket. If no one selects correctly all three finish positions, then the person(s) getting the most consecutive correct finish positions starting with their first chosen finish position of their TRI-3 ticket is the winner.
>
> COPYRIGHT LUCIO P. SALVUCCI, 1962" (15a)

Count One of the complaint alleges that appellant presented his creative work to NYRA in 1963 in the hope of selling it, but that, sometime thereafter,* NYRA

> "[used] a material appropriation of plaintiff's sequential order of finish entitled Big Triple and Triple copied from plaintiff's copyright entitled Tri-3 and Tri-3 Double." (Complaint, Count One, ¶ 19) (emphasis added)

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* The Triple was authorized by official rule for thoroughbred racing in New York by the New York State Racing and Wagering Board in 1973 (54a).

Counts Two and Three contain similar allegations directed against defendants Roosevelt Raceway, Inc. and New York City Off-Track Betting Corporation. The complaint seeks (1) a permanent injunction against defendants' "publishing, using, marketing or otherwise gaining profit from" the Triple and (2) damages as well as costs and plaintiffs' attorneys' fees.

Count Four of the complaint, directed against defendant Joseph Gimma "or his successor in title," realleges most of the substantive allegations of the previous counts, and then alleges that in his capacity as Chairman of the New York State Racing Commission, Gimma "licensed" the three other defendants to use plaintiff's copyright thereby joining said defendants in an infringement thereof. (Count Four, ¶ 3). Count Four seeks the same relief sought in the three previous counts.

The Parties

Plaintiff-appellant Lucio P. Salvucci is alleged to be a resident of the State of Massachusetts.

Defendant-appellee NYRA is a private, non-profit racing association incorporated pursuant to Section 7902 of Title 21 of the Unconsolidated Laws of the State of New

York (McKinney 1961), and owns and operates thoroughbred racing tracks at Aqueduct, Belmont Park, and Saratoga, New York.

Defendant-appellee Roosevelt Raceway, Inc. is a for-profit harness racing corporation, with a harness track located at Westbury, Long Island, and is incorporated pursuant to Section 8003 of the Unconsolidated Laws (McKinney 1961).

Defendant Joseph Gimma is named in his capacity of Chairman of the New York State Racing Commission, the State agency which formerly supervised thoroughbred racing in New York, and whose functions and powers were assumed in 1973 by the New York State Racing and Wagering Board (hereinafter "the Board"), pursuant to Sections 8161 et seq. of the Unconsolidated Laws (McKinney Supp. 1975-76). The Board also assumed supervision of harness racing and administers off-track betting corporations organized within the State. The original Racing Commission and Harness Racing Commission have been retained as purely advisory bodies. (Unconsolidated Laws § 8164) (McKinney Supp. 1975-76). Appellant does not appeal from the dismissal of the action as against either Mr. Gimma or the Board.

Defendant New York City Off-Track Betting Corporation is a public-benefit corporation created by Sections 8081 et seq. of the Unconsolidated Laws (McKinney Supp. 1975-76), and operates off-track betting facilities within the City of New York.

Defendants' Alleged "Infringements"

The conduct of parimutuel wagering in New York is strictly regulated by law, and is available only to licensed racing associations (see N.Y. State Constitution Article I, Sec. 9 (McKinney 1969); Unconsolidated Laws §§ 7952, 7954, 8008 (McKinney Supp. 1975-76); and to publicly-created off-track betting corporations (Unconsolidated Laws §§ 8061 et seq., 8081 et seq. (McKinney Supp. 1975-76)). Under these statutes, only such forms of wagering as are approved by the New York State Racing and Wagering Board may be adopted by such corporations, and only according to such terms and conditions as are set by officially promulgated rules and regulations of the Board.

In addition to the familiar win, place and show wagers, the Board has approved five additional types of wagers. Three of these are relevant here.* In the Exacta,

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* The remaining authorized wagers are the Daily Double, in which the winners of two races are to be selected, and the Quinella, a variation of the Exacta, in which the first and second place horses, irrespective of their actual order of finish, are to be selected (58a, 60a, 68a, 73a).

the Triple (also called the Trifecta) and the Superfecta, the bettor attempts to select, respectively, in exact order, the first two, first three and first four horses to finish in a designated Exacta, Triple or Superfecta race.*

The Triple, which appellant alleges to be an appropriation of his "Tri-3" conception is immediately seen as but a trivial and obvious extension of the Exacta, as is also the Superfecta, the only distinction being the number of horses in the sequence.** Appellant does not claim to hold a copyright for either the Exacta or Superfecta. Indeed, the Triple was well known long before any of the copyrights claimed herein. It is, for instance, popular in France, where it has been in existence under titles such as the Tierce and the Triplet since 1954 (55a, 80a).

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* The Board's official descriptions of and rules for these wagers are set out in the Appendix. For thoroughbred racing see 9(D) N.Y.C.R.R., §§ 4011.20 (Exacta) (60a), 4011.21 (Superfecta) (60a), and 4011.22 (Trifecta [Triple]) (61a-62a). For harness racing see §§ 4122.39 (Exacta) (71a), 4122.40 (Superfecta) (71a-72a) and 4122.41 (Triple) (72a-73a).

** It would appear that the only limitation on any further variation would be the number of horses entered in a race.

While the fact that a system of betting is not subject to copyright protection (Point I, infra) is entirely dispositive of this action, it should, nevertheless, be stressed that, even were the complaint somehow read to so allege, NYRA did not appropriate any copyrightable expression of appellant's (Point II, infra).

ARGUMENT

POINT I

A SYSTEM OF BETTING IS NOT COPYRIGHTABLE

It is hornbook copyright law that, while a particular written description or expression of a plan, system or method may be subject to copyright protection, the actual use or performance of the plan, system or method is not:

> "It is clear that neither mere ideas, nor titles may be protected under the present Copyright Act." 1 Nimmer on Copyright, § 8.4 (1975).
>
> "It is clear that systems for the playing of games or for engaging in contests or other activities may not be protected under the present Copyright Act." Id., § 8.5. See also § 37.83.

Since all that the Complaint alleges is that NYRA used "a material appropriation of plaintiff's sequential order of finish" (Complaint, Count One ¶ 9), the Complaint was properly dismissed. As Judge Mishler correctly observed:

> "The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright protection. . . . It is the manner of expressing and not the idea itself which is copyrightable." (138a-139a).

As noted, supra, p. 2, the Court of Appeals for the First Circuit has affirmed the dismissal of two actions identical to this one brought by Appellant and his wife in the District of New Hampshire. The Court stated:

> "[P]laintiffs find themselves unable to accept the fundamental difference between copyright and patent protection, although this case is a class example or illustration of it." Salvucci v. New Hampshire Jockey Club, Inc., No. 75-1 (1st Cir., Mar. 1, 1976) (Copy annexed hereto as Exhibit A)

The opinion below by the New Hampshire court stated:

> "Both cases are dismissed for failure to state a cause of action. The basis for both complaints is that the plaintiffs have originated a wholly creative work protected by the copyright law which the defendants have appropriated. The work is a system of betting on horse races. It has long been established that ideas cannot be protected by a copyright. See, Briggs v. New Hampshire Trotting and Breeding Association, Inc., 191 F.Supp. 234 (D.N.H. 1960) and the

> cases cited therein. The only way to protect an original creative idea is by a patent. It is obvious that the plaintiffs' betting systems are not patentable." Salvucci v. New Hampshire Jockey Club, Inc., Civil Actions Nos. 75-223, 75-224 (D.N.H., Oct. 6, 1975) (A copy of the Opinion appears at 116a-117a)

The principle relied upon both by Judge Mishler and in the opinions quoted above was stated and explained in the landmark case of Baker v. Selden, 101 U.S. 99 (1879). There, plaintiff copyrighted a book, "Selden's Condensed Ledger", which explained a particular system of bookkeeping. The Supreme Court held that plaintiff's copyright did not extend to provide him with a monopoly of the bookkeeping system itself. In so doing, the Court distinguished between copyrights and patents:

> "There is no doubt that a work on the subject of book-keeping, though only explanatory of well-known systems, may be the subject of a copyright; but, then, it is claimed only as a book. . . . The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government." (101 U.S. at 101-102)

> "[W]hilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it." (Id. at 104)

> "The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, it if can be secured at all, by letters-patent." (Id. at 105)

See also Mazer v. Stein, 347 U.S. 201, 217 (1954).

The principle set forth in Baker v. Selden has often been applied by this court. Thus, in Brief English Systems, Inc. v. Owen, 48 F.2d 555 (2d Cir.), cert. denied, 283 U.S. 858 (1931), the court rejected plaintiff's claim that he held a copyright to a form of shorthand known as "Speedwriting".

> "For present purposes it is enough to recognize that the plaintiff's shorthand system, as such, is open to use by whoever will take the trouble to learn and use it." (48 F.2d at 556)

> "Copyrighted material is found, if at all, in the explanation of how to do it." (Id.)*

See also, e.g., Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945) (rules for a card game); Jackson v. Quickslip Co., 110 F.2d 731 (2d Cir. 1940) (idea for a greeting card); Guthrie v. Curlett, 36 F.2d 694, 696 (2d Cir. 1929) (method of listing freight tariffs).

In Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967), the First Circuit held that, absent a patent, plaintiff had no exclusive rights in the idea of conducting a sweepstakes contest, the winner of which was to be determined by the random selection of social security numbers. See also Affiliated Enterprises, Inc. v. Gruber, 86 F.2d 958 (1st Cir. 1936) ("Bank Night" lottery for use by movie theatres); Seltzer v. Sunbrock, 22 F.Supp. 621, 630 (S.D.Cal. 1938) ("What Seltzer really composed was a description of a system for conducting races on roller skates. A system, as such, can never be copyrighted.") and Seltzer v. Corem, 107 F.2d 75 (7th Cir.

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* The regulations of the Copyright Office applicable to copyright registration themselves state that plaintiff's "idea" is not copyrightable. See 37 C.F.R. § 202.1 (1975):

> "Material not subject to copyright.
>
> * * *
>
> "(b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing. . . ."

1939) (same); Russell v. Northeastern Pub. Co., 7 F.Supp. 571, 572 (D.Mass. 1934) (collection of sample bridge problems); Freedman v. Grolier Enterprises, Inc., 179 U.S.P.Q. 476 (S.D.N.Y. 1973) (notation system involving the placing of point values on playing cards to be used in the game of bridge); Whist Club v. Foster, 42 F.2d 782 (S.D.N.Y. 1929) (competing sets of bridge rules).

Indeed, appellant's spate of actions throughout the Northeast* are not the first instances in which protection has been sought for a betting system under the Copyright Act. A situation strikingly similar to that presented here was before the court in Briggs v. New Hampshire Trotting and Breeding Ass'n, 191 F.Supp. 234 (D.N.H. 1960). The plaintiff in Briggs was the author of a brochure which described a betting system in which bettors were to select winning horses for each of seven consecutive races. Defendant, which operated the Rockingham Park racetrack, introduced at its track a form of wager in which bettors were to select the winners of six consecutive races. A brochure was distributed. The plaintiff in Briggs, like appellant here, claimed that he was entitled to the exclusive use of the plan or system of parimutuel betting

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* In addition to the actions in New Hampshire and this one, appellant has brought identical actions in Vermont and Massachusetts.

employed by defendant. The court rejected that contention and dismissed the complaint on the authority of Baker v. Selden, supra, stating:

> "[T]he statutes and court decisions give no protection by copyright to sports, games, or similar systems as distinguished from publications describing them." (191 F.Supp. at 236-37)

It is clear from the above that this case does present a "classic illustration" of the difference between copyright and patent protection. Indeed, appellant now admits that he "has no quarrel with the fundamental tenet of copyright law that an idea is not subject to copyright protection."* (Appellant's Brief p. 6) The judgment of dismissal must be affirmed.

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* Appellant, despairing of any protection under the copyright law of the United States, and completely misreading Article II, Section 1 of the Universal Copyright Convention, [1955] 6 U.S.T. 2731, 2733-34, T.I.A.S. No. 3324, attempts to fashion upon that misreading a novel theory which would apply Argentinian copyright law, rather than our own Copyright Act, to this action (App. Br. pp. 7-8). Article II, Section 1 of the Universal Copyright Convention actually provides that the published work of a national of one signatory state shall enjoy in each other signatory state the same protection which the other state affords works of its own nationals. Thus, copyright laws simply do not have any extraterritorial application and the only protection available is that provided under the law of the nation in which the alleged infringing acts occur. See 1 Nimmer on Copyright ¶65.61-62 at 263-64 (1975) and cases cited. An Argentinian national seeking to enforce his Argentinian copyright in this country would fare no better than appellant.

PCINT II

THE DISTRICT COURT'S ALTERNATIVE GRANT OF SUMMARY JUDGMENT WAS PROPER

As noted, supra, it is clear upon reading appellant's complaint that the only infringement which he claims is the appropriation by defendants of an idea, rather than the particular form in which he has described it. However, on the motions below and on this appeal, appellant has sought to have his complaint construed to allege the latter. Consequently, Judge Mishler held, alternatively, that even were the complaint interpreted to allege

> "an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants." (139a)

It is obviously appellant's hope that the limited availability of alternative methods to describe the most basic elements of the idea will furnish him a "back-door" method of protecting the underlying concept. Nowhere is this tactic better demonstrated than in the "appendix" which appellant annexes to his brief (p. 10) containing what are claimed to be the similarities between his

expression and that of the defendants. Two things should be noted at the outset about this purported side-by-side comparison. First, the description of the Triple printed by appellant is not derived from any "Rules and Regulations of the New York Racing Association § 4122.11" as alleged on the bottom of the page, but from the Rules and Regulations of the New York State Racing and Wagering Board pursuant to which harness racetracks may conduct the Triple. It is not even derived from the Board rule pursuant to which NYRA, which operates thoroughbred tracks, conducts the Triple.* Since appellant has not appealed the dismissal of his complaint as against the Board, it is obvious that he persists in misunderstanding the difference between protection of the use of an idea and protection of expression. Second, nowhere does appellant reveal that the description of the Triple on page 10 of his Brief is merely a series of individual sentence excerpts from the much more detailed Board rule (which is set forth in its entirely at pages 72a-73a). It is hardly surprising that the portions of the rule omitted by appellant contain

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* The harness and thoroughbred rules of the Board pertaining to the Triple, while essentially the same in operation, employ somewhat different language.

provisions wholly absent from appellant's publication. Nevertheless, with these many distinguishing features excised, even the excerpts derived by appellant bear no similarity to the appellant's copyrighted expression. Indeed, the Board's two descriptions of the Triple (61a-62a, 72a-73a) are worded quite similarly to the Board's own descriptions of the Exacta (60a-61a, 71a) and the Superfecta (61a, 71a-72a).

NYRA's own descriptions of the Triple (85a, 89a) (also annexed hereto as Exhibit B) appear in its Official Program and in a free educational pamphlet. Upon the most cursory examination, it is obvious that neither of NYRA's publications bears any similarity to appellant's, and that Judge Mishler's alternative grant of summary judgment was entirely appropriate.

In this case, it is clear that whatever superficial similarity might exist between NYRA's or any of the defendants' descriptions of the Triple and appellant's description results from the fact that they deal with the same simple idea, which itself is but a trivial and obvious extension of existing forms of wagers such as the Exacta. Similarity resulting from the fact that a work deals with

the same subject or has the same source does not constitute an infringement. Affiliated Enterprises, Inc. v. Gruber, supra, 86 F.2d at 961. In Chamberlin v. Uris Sales Corp., supra, 150 F.2d 512 (2d Cir. 1945), involving competing sets of rules for what was basically a well-known card game, Judge Frank stated:

> "The similarities of the two sets of rules derive from the fact that they were necessarily drawn from the same source." (150 F.2d at 513)

In Gaye v. Gillis, 167 F.Supp. 416 (D.Mass. 1958), the court stated:

> "[C]opyright is not infringed by an expression of the idea which is substantially similar where such similarity is necessary because the idea or system being described is the same." (167 F.Supp. at 418)

See also 2 Nimmer on Copyright § 143.11, at 626.2 (1975).

Moreover, in cases in which the subject matter involved necessarily allows little variation in the form of its expression, this Court has imposed a "stiff standard for proof of infringement", amounting to a required showing of appropriation in exact form or substantially so. Continental Casualty Co. v. Beardsley, 253 F.2d 702, 705-06 (2d Cir.), cert. denied, 358 U.S. 816 (1958) (no

infringement where similar language in insurance form was used "only as incidental to . . . use of the underlying idea."); Ricker v. General Electric Co., 162 F.2d 141, 142 (2d Cir. 1947) (explanations of scientific concepts). See also Dorsey v. Old Surety Life Ins. Co., 98 F.2d 872, 874 (10th Cir. 1938); 2 Nimmer on Copyright § 143.11 at 626.2 (1975). Thus, this standard was applied in Freedman v. Grolier Enterprises, Inc., supra, 179 U.S.P.Q. 476 (S.D. N.Y. 1973), where plaintiff claimed that defendants' printing of bridge point value numerals directly on playing cards infringed upon his expression of the same idea. The court stated:

> "Even if plaintiff's use of point count values on playing cards were copyrightable, there was no copying of the kind sufficient to make defendants liable. As indicated above, it is the expression of an idea, not the idea itself, which can be copyrighted. When the expression of the idea can be carried out only in more or less stereotyped form -- i.e., where the variations available to one who wishes to use an idea are quite limited -- then it may be that even small variations or differences in the mode of expression will be such as to preclude liability for copying." (179 U.S.P.Q. at 479) (Emphasis added.)

In Morrissey v. Procter & Gamble Co., supra, 379 F.2d 675 (1st Cir. 1967), a case involving sets of similar rules for a sweepstakes contest, the court stated:

> "When the uncopyrightable subject matter is very narrow so that 'the topic necessarily requires,' . . . if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. . . . We cannot recognize copyright as a game of chess in which the public can be checkmated.
>
> "Upon examination the matters embraced in [the contest rule] are so straightforward and simple that we find this limiting principle to be applicable." (379 F.2d at 678-79, citations omitted, emphasis added).

In the instant case, appellant's bare three sentence description of a trivial and obvious variation of wagers such as the Exacta and the Superfecta is itself so rudimentary that to grant it any measure of copyright protection whatsoever would be tantamount to granting a monopoly of the underlying idea. It is unnecessary, however, to go so far, since it is absolutely clear, as Judge Mishler found, that "plaintiff's method of expression was never employed by defendants." (139a)

CONCLUSION

For the foregoing reasons, the Order of the

District Court should be affirmed in all respects.

Dated: New York, New York
April 9, 1976

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1434

LUCIO P. SALVUCCI et al.,
Plaintiffs, Appellants,

v.

NEW HAMPSHIRE JOCKEY CLUB, INC., et al.,
Defendants, Appellees.

Before Coffin, Chief Judge,
Aldrich and McEntee, Circuit Judges.

MEMORANDUM AND ORDER

Entered March 1, 1976

Per Curiam. On this appeal plaintiffs appellants, who have written and copyrighted certain material describing complicated betting systems for use when parties wish to bet on combinations as distinguished from a single horse or dog, brought suit against various racing associations, alleging that, after notice, they adopted and followed plaintiffs' systems, in violation of the copyright laws. 17 U.S.C. § 101. From a dismissal of the complaint, plaintiffs appeal.

As the district court correctly divined in its memorandum opinion accompanying its dismissal, plaintiffs find themselves unable to accept the fundamental difference between copyright and patent protection, although their case is a classic example or illustration of it. A system of betting is an idea, or system. Affiliated Enterprises v. Gruber, 1 Cir., 1936, 86 F.2d 958. One acquires no protection in such by copyrighting a book about it. Baker v. Selden, 1880, 101 U.S. 99.

We have examined the record and plaintiffs' brief. The issue and the answer are so clear that no purpose would be served in hearing oral argument. Judgment is affirmed under Local Rule 12.

By the Court:

Dana H. Hallups

Clerk.

[cc: Messrs. Salvucci, Wells, Dunn and Ahlgren.]

EXHIBIT B

NYRA's Published Descriptions of the Triple

From the Official Program:

"TRIPLE ON 9th RACE ONLY

"Triple tickets are sold in the same locations as Daily Doubles and Exactas on all floor levels.

"To play the Triple go to any window that has the purple $2 Triple sign. Tickets are sold in $2 denominations. Ask for the numbers of the three (3) horses that you think will finish first, second and third. You must call the numbers in the exact order that you think the horses will finish one, two, three.

"To Box three horses in the Triple costs $12. These tickets are sold where the orange $12 Box Triple signs are above the window.

"In a Box Triple you must select the numbers of the three (3) horses you think will finish either first, second or third. The Box Triple ticket will give you all 6 possible combinations of those three horses finishing first, second or third. When asking for a $12 Box Triple ticket you must call the lowest program number first, the next highest number second and the highest number last. If these three horses all finish first, second and third--in any order--it is a winning ticket.

"Triple tickets will be cashed on the ground floor of the Clubhouse and Grandstand. The winning purple $2 Triple ticket may be cashed at all $2 Win Cashier Windows on the ground floor and the winning orange $12 Box Triple ticket may be cashed at all $5 and $10 Win Cashier Windows." (85a)

From the educational pamphlet "The ABC's of Thoroughbred Racing":

"The 'TRIPLE' is a newly established form of wagering, and a separate pool, and occurs on the 9th race only. To play the Triple ask for the numbers of the three horses you think will finish first, second and third. You must call the numbers in exact order that you think the horses will finish one, two, three.

"If by your computations you are sure that three horses will be first, second and third in any order, the track offers a simplified means to incorporate all three numbers into one wager--the 'BOX TRIPLE'. The Box Triple Ticket will give you all six possible combinations of those three horses finishing first, second or third in any order. When asking for a Box Triple ticket costing $12, you must call the lowest program number first, the next highest number second and the highest number last. If these three horses finish first, second and third--in any order--it is a winning ticket." (89a)

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

LUCIO P. SALVUCCI,

Plaintiff-Appellant,

-against-

THE NEW YORK RACING ASSOCIATION INC. et al.,

Defendants-Appellees.

AFFIDAVIT OF SERVICE

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

IRA A. FINKELSTEIN, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 9th day of April, 1976, I served the annexed Brief for Defendant-Appellee The New York Racing Association Inc. upon:

Bauer, Amer & King P.C.
114 Old Country Road
Mineola, New York 11501

Lucio P. Salvucci
746 Commercial Street
Weymouth, Massachusetts 02189

by depositing true and correct copies thereof in a post-office box regularly maintained by the United States Postal Service at 80 Pine Street, New York, New York 10005, enclosed in a postpaid, sealed envelope addressed to the above-mentioned attorneys.

Jan A. Finkelstein

Sworn to before me this
9th day of April, 1976.

Robert R. Cawthra

Notary Public

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0600[illegible]0
Qualified in New York County
Commission Expires March 30, 1977